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Obviously, the
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DEPARTMENT OF STATE - A/CDC/MR

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RECOMMENDATIONS REGARDING THE UNITED STATES-JAPAN

TREATY OF COMMERCE AND NAVIGATION

submitted by

The Federation of Economic Organizations
The Japan Federation of Industries

Japan, after the Treaty of San Francisco goes into effect, will be called upon to enter into treaties of commerce and navigation with various nations in order to further and coordinate friendly and economic relations with the world at large. Moreover, since these treaties of commerce and navigation must be concluded as soon as possible after the treaty of peace goes into force, preliminary discussions are already under way with the Government of the United States for the drafting of such a pact with that nation.

The Federation of Economic Organizations and the Japan Federation of Industries, in full realization that this proposed commercial treaty between the two countries will impinge with great force upon the future international activities of Japan, have given the most careful consideration to the matter, and are agreed that the negotiations should be undertaken in general in line with the views set forth below.

Section I. Basic Considerations for the forthcoming Treaty of Commerce and Navigation.

1. In so far as the United States and Japan, in view of the current situation, will in future be bound by cultural and economic ties far exceeding in intimacy those of prewar times, the substance of the forthcoming agreement on commerce and navigation will unquestionably be of the utmost consequence and significance. Moreover, since the proposed pact between the United States and Japan, will form a precedent upon which will be based future treaties of commerce and navigation with other world powers, it will be necessary, in the drafting of the text, to give due thought also to the relationships which may arise in future with nations other than the United States. Naturally such future treaties need not necessarily be identical with the proposed agreement between the United States and Japan; it would be logical and

justifiable to enter into specific arrangements most befitting the circumstances. Consequently, with the forthcoming pact, it is recommended that all matters of special interest only to the United States and Japan be kept apart from the provisions that are generally applicable. For instance, conditions obtaining within any particular country other than the United States must be given special consideration in connection with mutual accordance of most-favored-nation treatment.

2. In so far as treaties of commerce and navigation exist for the furtherance of economic relations and friendship between the signatory powers, it is obvious that the agreement must provide for maximum free business activities including entry, trade and navigation. However, written agreements are necessary because in actual practice each nation invariably imposes some restrictions on foreign nationals. Furthermore, World War II resulted for Japan, in the loss of a major portion of her accumulated national wealth, and in a serious upsetting of the balance between population and available material resources. Therefore, Japan is in no condition for immediate exposure to the stormy winds of the world economy; and hence the various protective measures such as the Foreign Investment Law and special legislation for specific fields of enterprise. In drafting the forthcoming treaty, the right must be reserved to grant domestic industry a certain degree of protection.

3. Since World War II, the world economy has been regulated to a great extent by international agreements and organizations, other than treaties of navigation and commerce, such as the General Agreement for Tariffs and Trade (GATT), the International Monetary Fund (IMF), and various bilateral and multilateral agreements on trade and payments. Currently, many nations, among which may be counted Japan, are not participating in any or some of the organizations mentioned above. Consequently, it has become general practice to include in treaties of commerce and navigation provisions for coordinating customs tariffs to GATT rates, and stipulations concerning exchange control; protection of foreign capital; import and export restrictions; and other matters. But in the case of postwar Japan there exist so many economic abnormalities that it would be extremely difficult to abide strictly by the rules of the International Monetary Fund; and even were she to seek participation in GATT there

is apparently no assurance that permission would be forthcoming. Consequently, with matters such as the above, which cannot as yet be written into the forthcoming pact as permanent arrangements, it is recommended that they be dealt with apart from the main text as special, provisional agreements, or with specific recognition of their temporary nature.

4. It appears that the preliminary discussions are being conducted with the United States - Colombia Treaty of Friendship, Commerce and Navigation of 1951 as the working model. Consequently, Section 2 of these recommendations, "Principal Provisions of the Treaty," is also based on the United States - Colombia Treaty. However, since in various ways Japan is more similar to Italy than to Colombia, it is recommended that the United States - Italy Treaty of 1948 and other similar agreements be used as reference, and that when necessary the spirit of the United States - Italy Treaty be made to prevail.

5. In so far as once a treaty of commerce and navigation is signed, it takes precedence over various national laws and regulations, any law that infringes upon the treaty must logically be revised. Nevertheless, national laws and regulations exist because of specific reasons for their enforcement; so in drafting the forthcoming treaty the greatest care should be exercised not to violate the intent of national legislation, and any shortcomings in the national law should be promptly remedied.

Section 2. Principal Provisions of the Treaty

Needless to say, the provisions which are to be written into the United States - Japan Treaty of Commerce and Navigation must be thoroughly studied from an angle which adequately reflects the special conditions and requirements of Japan. However, the recommendations that follow below, in regard to the principal provisions which are expected to be discussed during the preliminary negotiations, are arranged for the sake of convenience in the pattern set by the treaty between the United States and Colombia.

1. Treatment of Entry, etc. Territorial Scope of Trade and Commercial Activities after Entry.

a. Article 2 of the United States - Colombia Treaty merely provides mutually for entry, sojourn, domicile, travel, etc. without any special accordance of most-favored-nation treatment. With the forthcoming United States - Japan treaty, it is believed that entry, sojourn, domicile, travel, etc. should be mutually permitted on a most-favored-nation basis in order to further friendly relations between the peoples of the United States and Japan.

b. Article 2, Paragraph 1-a of the United States - Colombia treaty stipulates that the territorial scope of trade and commercial activities of businessmen after entry as provided by the treaty shall be restricted to that of the signatory powers. In order to permit trade and commercial activities with third parties, it is recommended that, in the United States - Japan treaty, the restriction of territory to only that of the signatory nations be waived.

2. Protection of Property and Business pertaining to Individuals or Corporations.

a. The United States - Japan treaty should, logically, provide mutually for constant protection, guarantee and adequate compensation in the event of official requisition or seizure, of property and business pertaining to individuals and corporations operating in the respective territories of the signatory powers, as is stipulated in Article 6, Paragraphs 1-3 of the United States - Colombia treaty. However, with official requisition of property and business, while it is unavoidable when the laws of the signatory powers so require for the benefit of the public, the wording of the United States - Colombia treaty is so vague as to cause unnecessary apprehension on the part of entrants. Consequently, instead of allowing official requisition or seizure when "socially beneficial", the forthcoming treaty should be so written as to permit official requisition only when carried out for a purpose clearly defined by the law.

b. Definite provision should be made that property and business of individuals and corporations in the territories of the signatory powers shall be adequately protected, guaranteed and compensated, even when exposed to danger, in the unfortunate event of either of the signatories entering into a state of war with a third party.

c. Provision should be made that shipping, aircraft and other means of transportation, which are engaged in international traffic, operating under the nationality of one of the signatory powers, shall not be subject to official seizure of requisition even though temporarily located within the territorial limits of the other.

d. The United States - Colombia treaty provides, in Article 6, Paragraph 2, that housing, offices, warehouses factories, and the sites thereof, pertaining to nationals and corporations of one signatory, and located within the territorial confines of the other, shall be free from search, inspection and other interference. It is recommended that in the forthcoming treaty, shipping, aircraft and other means of transportation be added to the properties named.

3. Protection of Investments

The United States - Colombia treaty, in Article 6, Paragraph 4, provides that the signatories in their respective territories shall not discriminate against rights and privileges lawfully acquired by their respective nationals and corporations, and that equal conditions shall apply to investments necessary for the economic progress of individuals and corporations.

Japan, needless to say, is in such a position that, for further development of the economy in general, she must promote induction of healthy foreign capital and offer adequate protection to foreign investors. However, since the scale of Japan's economy is as yet diminutive, with accumulation of domestic capital extremely low, there is the danger that unlimited participation by foreign capital in Japanese enterprise, with uniform protection given regardless of nationality or type of enterprise, might result in excessive pressure on Japanese business and lead to the handicapping of Japan's economic growth.

If, in the forthcoming United States - Japan commercial treaty, special favored treatment and protection is accorded United States capital, the same favors will ultimately have to be granted to the other nations with which treaties of commerce and navigation will be negotiated in the future. With these facts given due and careful consideration,

it is believed that even between the United States and Japan, it will be advisable for Japan to reserve the right to impose certain restrictions on investments in Japanese enterprise.

Giving due consideration, in the commercial and navigation treaty, to protection of foreign capital in the manner outlined above, it will be appropriate to set up standards, on the basis of the national Foreign Investment Law, in regard to acquisition by foreigners of property rights, remittance of invested principal and interest, business activities, and other related matters. Furthermore, it is recommended that provision be made in the forthcoming commercial treaty for retention of the right to impose certain restrictions such as those exercised through the Foreign Investment Law, and to limit protection of foreign investors to the extent that no ill effect is felt by Japan's economy as a whole.

4. Business Activities of Individuals and Corporations

a. The United States - Colombia treaty, in Article 7, Paragraph 1, lists the types of enterprise permitted to be engaged in by the nationals and corporations of the signatory powers in their respective territories under national or most-favored-nation treatment. In the case of Japan, it is recommended, because of actual conditions, that the insurance business be added to the list. Although insurance has, heretofore, been usually included in financing or banking, the insurance business has developed such characteristic features of its own that it should be listed separately.

It is recommended further that the business activities listing in the United States - Colombia treaty be elaborated upon, and that the descriptions and approval or disapproval be made more definite.

For instance, it is difficult to decide how to classify buying and selling of securities; real estate business; repairing; assembly; blending; etc., in commerce; manufacturing; processing; banking; etc. Also, it is difficult to ascertain whether warehousing, transportation, aviation, tourism, motion pictures, and other various enterprises come within the permissible activities.

In the forthcoming treaty, therefore, classification and definition of business activities should be done with clarity; so that ambiguity in terminology may not become the cause for future disputes.

b. The manufacture of implements of war, explosives and propellant charges, and harbor and inland water pilots, etc. have customarily been restricted to nationals. Consequently, it is recommended that the prewar law restricting these activities to Japanese nationals be revived. Furthermore, the present law stipulating that notaries public shall be Japanese citizens should continue in force.

c. In regard to banking, the United States - Colombia treaty, with its Protocol No. 5, and other international agreements recognize such activities as deposit and foreign exchange business engaged in by foreign banks, which are related to international banking operations. But issue of banknotes and the handling of domestic deposit business are subject to reservations.

Although, in the case of Japan, there is no special objection against according national treatment to American banks, there is doubt as to whether, among other things, equality can be maintained in dealing with confidential deposits. Moreover, since, in the United States some states, by their respective laws, forbid foreign banks to engage in deposits business, it is believed that Japan should reserve the right to bar United States banks from handling domestic deposits and the issuing of banknotes within Japanese territory.

d. Although the United States - Colombia treaty, in Article 7, Paragraph 2, provides for most-favored-nation treatment in regard to prospecting and development of mineral resources, it has in actual practice been an international custom to bar foreign nationals from ownership of mining rights. Japan's Mining Law stipulates in Article 17 that only Japanese and Japanese juridical persons are entitled to mining concessions in Japan.

Mining rights, as defined in the Mining Law of Japan, cover all activities from prospecting to actual working; and since it is undesirable to cede such rights to foreign nationals, it is recommended that the forthcoming

United States - Japan treaty adhere to the principle laid down by the existing Mining Law.

Despite the provisions of the Mining Law, the operation of mines in Japan is open to foreigners if they establish mining corporations in Japan or invest in Japanese companies engaged in mining. Consequently, even if the forthcoming treaty adheres to the stipulations of the present Mining Law, it is believed that no adverse effect will be reflected in the development of Southeast Asia mineral resources by Japanese business.

5. Corporations, their Establishment and Activities:

a. In regard to the establishment of corporations and to their activities, the United States - Japan commercial treaty should, as set forth in Article 8 of the United States - Colombia Treaty, clearly indicate adherence to the respective national laws and accordance of national treatment. However, with the United States - Colombia Treaty, perhaps because of the special economic and geographical conditions, the stipulations regarding establishment procedures, rights and privileges of management and operation of acquired enterprises, and certain other matters are left considerably less defined than in the United States agreements with Italy and Nationalist China. With the forthcoming treaty, it is recommended, in so far as national treatment is to be accorded, that these matters be dealt with in detail as was done in the United States treaties with Italy and China.

Furthermore, if the enterprises are to be listed as was done in Article 8 of the United States - Colombia Treaty, the shipping business (mercantile marine) should be added.

b. The manner of dealing with establishment of corporations and the activities thereof has much to do with the problem of according protection to foreign capital investments; and with the present state of Japan's economy it is felt that indiscriminate and unrestricted participation by any foreign power in Japanese business, through establishment of Japanese corporations, or through acquisition of control or operation rights, will in all probability greatly affect Japanese business and the economy as a whole. Consequently, Japan should be permitted to continue with the present system whereby a certain degree of control is exercised through enforcement of the Foreign Investment Law. Furthermore, there is the possibility of certain foreign business activities to which the Foreign Investment Law is not applicable, that may adversely affect the economy of Japan. It is deemed advisable to include, in the forthcoming treaty, provisions for the control of such activities among Japan's basic and general merchandise industries.

6. Acquisition, Possession and Disposal of Property Rights

a. In Article 9, Paragraph 1-a of the United States - Colombia Treaty are listed the types of Colombian business which can, under national treatment, lease, possess and utilize immovable property such as land and buildings in the United States. In the forthcoming treaty, the mercantile marine business should be added to the businesses listed, and provision should be made to permit shipping enterprises to use, lease and/or possess wharf and warehouse facilities, harborcraft and other property in the United States.

b. Since it is undesirable, from the Japanese standpoint, to permit speculative acquisition, possession and disposal of immovable property by foreign nationals, the control exercised by the present Foreign Investment Law should be continued; while, by proper application of said Law, the acquisition, possession and disposal, etc. of immovable property by foreign nationals should be permitted only when necessary for commercial purposes.

c. The ownership of land in the United States by Japanese nationals is prohibited by the Citizenship, Immigration and State Laws. Although the United States Congress is now considering amendment, in this respect, of the Citizenship Law in order to permit naturalization of Japanese residents, the forthcoming treaty, it is felt, should deal with the acquisition and disposal of land mutually on a most-favored-nation basis.

7. National Taxation Problem

Although the provisions of Article 11 of the United States - Colombia pact, in regard to national taxation, are believed to be generally satisfactory, it is felt that Japan should retain full autonomy over the levying of taxes. Moreover, it is desirable to enter as soon as is practicable into arrangements with the United States and other Powers for prevention of double taxation, and for adequate cooperation in the collection of taxes. Therefore, special attention must be given at this time to the taxing of patent

royalties and other similar charges in the extent that the induction of foreign technology will not be impaired.

8. Problem of Exchange Control

The provisions of Article 12 of the United States-Colombia treaty, vis-a-vis foreign exchange control, permit imposition of control when internal currency reserves fall too low, although in principle, the International Monetary Fund policy of decontrol is upheld. Furthermore, the method of settlement between the signatory powers, when regulation of exchange is in effect, is prescribed.

This arrangement, it is believed, would be applicable to Japan after her participation in the International Monetary Fund. But in so far as Japan is not as yet a member nation, and since her economy is of such a special pattern as to call for perhaps permanent regulation of foreign exchange, it is recommended that the subject of exchange control be excluded, at least temporarily, from the text of the forthcoming treaty; and that inclusion of appropriate provisions in this respect be undertaken after Japan has formally joined the International Monetary Fund.

9. Problem of Customs Duties

Under the provisions of the Treaty of Peace, Japan is under obligation, after that treaty goes into effect, and until treaties of commerce and navigation are signed with the United Nations Powers, to accord most-favored-nation treatment with respect to customs tariffs. However, despite the present international trend for all the principal nations to participate in the General Agreement for Tariffs and Trade, the United States, when signing treaties of commerce and navigation with Italy and Uruguay, both non-participants in GATT at that time, granted these nations most-favored-nation treatment while withholding application of GATT rates. Nevertheless, since subsequently, with Italy's participation in GATT, the rates of that agreement were adopted, and since West German participation in GATT was permitted although western Germany is not as yet signatory to any treaty of commerce and navigation, it is believed that basic solution of the tariffs problem

in the case of Japan can be achieved by her prompt participation in GATT.

Currently, because of opposition on the part of certain Powers, Japan's early participation in GATT is viewed as rather difficult. But a situation wherein Japan is excluded from tariff agreements with other Powers and reciprocal benefits would retard her export trade, weaken her balance of payments, and be extremely detrimental to the maintenance and growth of her economy which perforce must be largely dependent on international trade. Consequently, every effort must be made to seek an arrangement whereby, even before participation in GATT, Japan may be accorded, through treaties of commerce and navigation, most-favored-nation treatment in tariff rates.

Recently, the United States Congress has been considering upward revision of customs duty on imports of frozen Japanese tuna. In this connection it is recommended that negotiations with the United States Government be promptly initiated to seek an agreement, separate from the forthcoming treaty of commerce and navigation, to refrain from discrimination against Japanese commodities.

Another basic requirement is to seek the inclusion, in the forthcoming treaty, of provisions, in the spirit of the Havana Charter, foregoing upward revision of tariff rates without the approval or understanding of the parties that may be affected thereby.

10. Problems of Import-Export Embargoes and Restrictions, and National Treatment of Imported Commodities

a. Article 14, Paragraph 2 of the United States - Colombia Treaty forbids, in accordance with the second part of GATT, the restriction in principle of imports and exports for political reasons, providing at the same time for the imposition of restrictions when necessitated by economic conditions. These provisions are acceptable in the case of Japan because the rise and fall of her national economy depends predominantly on her import-export balance.

If frequently happens with Japan that, mainly in connection with exchange control, restrictive measures on both import and export become necessary. Currently, Japan is confronted with the serious problem of trade adjustments in dealing with the sterling and dollar areas; and as long as the position of the £ sterling remains unchanged for the better, regulation to some extent of exchange and trade with the £ sterling bloc will be a fundamental and unavoidable necessity for the maintenance and growth of Japan's economy which is far from normal. Consequently, it is recommended that in the forthcoming treaty Japan make special reservations in respect to this problem, as with control of foreign exchange, to ensure that no obstacle may arise to prevent such restriction of import and export as is necessitated by economic conditions resulting from domestic and international developments.

b. The stipulation of Article 16, Paragraph 1 of the United States - Colombia Treaty, according national treatment to products of the other party, is acceptable at first sight. But in the case of Japan there are such special commodities as imported staple foodstuff, Office of International Trade and International Materials Conference supplies, and others, that inability to accord national treatment to certain imported products can be visualized in advance. Consequently, reservations in this respect will have to be made in the forthcoming commercial treaty.

c. Article 16, Paragraph 2 of the United States - Colombia Treaty provides that national treatment shall be accorded the products of corporations owned or controlled by one of the signatories and located in the territory of the other. If this arrangement were to be unconditionally adopted in the case of Japan, there would be the possibility of unwarranted pressure brought to bear upon domestic products and enterprise, despite implementation of tariff measures. Therefore, in the forthcoming treaty, national treatment should be accorded only to products of foreign cooperations established and operating in Japan under the Law of Japan.

11. Prevention of Exclusive Trade Practices (formation of trusts, cartels, etc.)

Article 18, Paragraph 1 of the United States - Colombia Treaty, which provides for elimination of exclusive trade practices, such as the formation of combines, trusts, cartels, etc., which restrict competition, is in accordance with the principle of freedom of trade, laid down by the ITO Charter. However, it must be noted that these provisions do not forbid all combinations of enterprise or inter-trade agreements as harmful, and that the main purpose is to prevent such injurious practices as aggressive action to restrict competition in international trade, exemplified by the trusts and cartels of prewar days. If the aim of the United States - Colombia Treaty provisions is as outlined above, it must be considered permissible for Japan to create export associations having as their objective prevention of "dumping"; betterment of overseas credit ratings; and strengthening of the business capacity of the trading firms which have been thoroughly emasculated, particularly in comparison to their flourishing foreign counterparts, by the dissolution of the "zaibatsu" and other postwar action for the deconcentration of economic power. Furthermore, it is believed possible to arrange for participation by Japanese shipping interests in the International Shipping Rates Alliance.

In the light of the foregoing, it is considered unnecessary to include in the text of the forthcoming treaty the provisions for elimination of practices tending to restrict competition. It would, rather, be more appropriate to apply the present Anti-Monopoly Law, in accordance with the principles of the International Trade Organization Charter.

12. Navigation

a. Although in the first part of Article 19, Paragraph 3 of the United States - Colombia Treaty provision is made for mutual entry of cargo-laden vessels, no mention is made of loading and unloading of cargo. Consequently, in the forthcoming treaty, it is recommended

that the provisions of the United States - Italy Treaty, in this respect, be adopted to stipulate that: vessels of one signatory power shall be permitted to call and discharge a portion of its cargo, including passengers, at any port, location or territorial waters of the other, open, at present or in future, to foreign trade and navigation, and shall be permitted to proceed to similar other ports, locations or territorial waters, without payment of tonnage levies or harbor charges higher than that paid by vessels of national registry. Vessels of either signatory power shall be permitted to take on cargo and passengers, under the same conditions, on any single trip, at ports, locations and territorial waters, open at present and in future to foreign trade and navigation.

b. Article 21 of the United States - Colombia Treaty, which sets forth exceptions in the application of the terms, states in Paragraph 2 that with respect to the handling of freight the provisions for most-favored-nation treatment in the United States - Colombia Treaty will not be prejudicial to the benefits mutually accorded among the United States and its Possessions, the Republic of Cuba, the Republic of Philippines, the Mandated Pacific Islands and the Panama Canal Zone. If the same arrangement is written into the forthcoming treaty, the above-mentioned areas may mutually accord favored treatment for cargo carried by their respective vessels, and thus discriminate in various ways against Japanese shipping plying between these places. Since Japanese shipping is engaged in a great deal of navigation and freight carrying in the above-mentioned waters, it is recommended that efforts be made to exclude from the forthcoming United States - Japan commercial treaty any provision likely to impose unreasonable restrictions on Japan shipping, even where special waters and areas are involved.

13. Passports and Visas

In view of the increasing opportunities and necessity for travel between the United States and Japan, it is recommended that special consideration be extended to simplification of procedures for travel clearances, issuance of passports, granting of visas, etc.

(March 26, 1952)